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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

ENOCH ADAMS, JR., LEROY ADAMS, )  
ANDREW KOENIG, JERRY NORTON, )  
DAVID SWAN, JOSEPH SWAN, )  
Plaintiffs, )

vs. )

TECK COMINCO ALASKA )  
INCORPORATED, )  
Defendant, )

NANA REGIONAL CORPORATION, and )  
NORTHWEST ARCTIC BOROUGH, )  
Intervenor-Defendants. )

Case No.: A04-00049 CV (JWS)

**TECK COMINCO's OPPOSITION  
TO MOTION TO SUPPLEMENT COMPLAINT**

Discovery in this case is closed, witnesses have all been identified, and the parties are now preparing for a lengthy and complicated trial. Despite all of this, the plaintiffs now seek permission to supplement their complaint in October of this year to allege that on 574 out of 772 separate occasions, Teck Cominco did in some manner violate one or more of the conditions of its NPDES permit at Red Dog Mine. [Docket 174 at 5.] Their motion should be denied.

“Under the Rule, allowance or denial of leave to file a supplemental pleading is addressed to the sound discretion of the District Court.” United States use of Atkins v. Reiten, 313 F.2d 673, 675 (9th Cir. 1963). Under Rule 15(d), leave to supplement should only be granted when doing so “will promote the economic and speedy disposition of the controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any other party”. Bornholdt v. Brady, 869 F.2d 57, 68 (2nd Cir. 1989); citing 6A Wright, Miller, & Kane, *Federal Practice and Procedure: Civil 2D* § 1504 (1971). The claims that the plaintiffs seek to add involve factual issues not attendant to any of the pre-existing claims, and will require the presentation of additional factual and expert evidence. [Halloran Affidavit.] For example, the plaintiffs are asserting claims that Teck Cominco violated a 3900 mg/l “end of pipe” parameter for TDS that was first incorporated into Teck Cominco’s permit in July, 2003. Defending these claims will require the addition of expert and factual testimony about what the 3900 parameter is, how it is properly applied to Teck Cominco’s discharge, and how to read the data attendant to this parameter. Similarly, where certain parameters of the 2003 permit modifications affecting discharge during the grayling spawning season were stayed as a result of the plaintiffs’ administrative appeal of those modifications<sup>1</sup>, the plaintiffs apparently now seek to assert that the TDS monthly average in June of each year is somehow

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<sup>1</sup> Following the appeal of the 2003 permit, the EPA incorporated standards for the discharge of TDS during spawning season into the 2007 permit. The plaintiffs again appealed so as to obtain a further stay.

lower than the value established in the permit.<sup>2</sup> Defending against such a claim will require additional expert and factual testimony regarding what the monthly average limitation is during June, and whether Teck Cominco met that standard in June of each of the past several years. The simple fact is that adding claims to this litigation at this late date will not promote the economic and speedy disposition of the controversy because it will require additional time for discovery, and the preparation of substantial additional testimony at trial. In light of the fact that this case is already stretching the court's ability to accommodate a trial, the established contours of this case should remain in place, and any new claims that the plaintiffs may want to bring should await their next round of litigation.

The plaintiffs have made clear that they intend to sue Teck Cominco for as long as Red Dog Mine discharges into the Red Dog Creek. Accordingly, the plaintiffs assert that they will file a separate suit if they are not allowed to amend their complaint in this litigation. [*Id.* at 2, 3-4.] That alone is sufficient reason for the court to deny amendment. As the Ninth Circuit Court has recognized, "leave to file a supplemental pleading will be denied where the supplemental pleading could be the subject of a separate action". Planned Parenthood v. Neely,

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<sup>2</sup>

We say "apparently", because the information in the supplemental complaint is insufficient to determine exactly what the claim is without further discovery. Because spawning season could last anywhere from three days to two weeks, and sometimes extends into the first days of June, we assume that the plaintiffs are contending that they are entitled to enforce some, as yet unspecified, lower monthly average during that month.

130 F.3d 400, 402 (9th Cir. 1997); quoting 6A Wright, Miller, & Kane, *Federal Practice and Procedure: Civil 2D* § 1509 (1990).

DATED at Anchorage, Alaska, this 19<sup>th</sup> day of September, 2007

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By: \_\_\_\_\_

Sean Halloran

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_ day of September, 2007,  
a true and correct copy of the foregoing was served,  
via electronic service, on the below identified parties of  
record:

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